LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 23 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

—vs.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

BRIEF FOR THE PETITIONER

KENNETH L. MADDY
616 First Western Bank Building
1221 Van Ness Avenue
Fresno, California 93721

INDEX

Page

SUBJECT INDEX

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statement of the Case 3

Factual Background 4

Summary of Argument 7

Argument:

I. The Conduct of, and Procedures Followed, by the Police and Prosecution in Two (2) Lineups and in a Personal Confrontation With the Victim of a Robbery and Petitioner, Were Highly Suggestive and Conducive to Mistaken Identification and Violated the Rights of Petitioner, Walter Foster, to Due Process of Law 8

II. The Compelled Confrontation of Petitioner and a Prosecution Witness in a Private Place, and in the Sole Presence of the Prosecution Authorities, Where Petitioner Was Required to Speak and Converse With the Witness Violated Petitioner's Privilege Against Self-Incrimination 21

Conclusion 29

CITATIONS

CASES:

Biggers vs. *Tennessee*, — U.S. —, 19 L ed 2d 1267 (1968) 14

Crume vs. *Beto*, 383 F.2d 36 (C.A. 5th Cir. 1967) 17

Page

Gilbert vs. *California*, 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967) 8, 9, 11, 20, 23, 24, 29

Miranda vs. *Arizona*, 384 U.S. 436, 16 L ed 2d 694, 86 S.Ct. 1602 (1967) 21, 24, 26, 27

Palmer vs. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966) 12, 13, 16, 28

People vs. *Ballott*, 20 N.Y. 2d 600, 233 N.E. 2d 103 (1967) 14

People vs. *Caruso*, 68 A.C. 181, 436 P.2d 336 (1968) 15, 16

People vs. *Ellis*, 65 Cal.2d 529, 421 P.2d 393 (1966) 27

People vs. *Pedercine*, 256 A.C.A. 357, 63 Ca. R 873 (1968) 25

Rochin vs. *People of California*, 342 U.S. 165, 96 L ed 183, 72 S.Ct. 205 (1952) 11

Schmerber vs. *California*, 384 U.S. 757, 16 L ed 2d 908, 86 S.Ct. 1826 (1966) 26, 27

Simmons vs. *United States*, — U.S. —, 19 L ed 2d 1247 (1968) 11

State vs. *Ramirez*, 76 N.M. 72, 412 P.2d 246 (1966) 27, 28

Stovall vs. *Denno*, 388 U.S. 293, 18 L ed 2d 1199, 87 S.Ct. 1967 (1967) 11, 14, 15, 20, 28

United States vs. *D'Argento*, 373 Fed. 2d 307 (C.A. 7th Cir. 1967) 27, 28

United States vs. *Wade*, 388 U.S. 218, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967) 8, 9, 11, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28

Wong Sun vs. *United States*, 371 U.S. 471, 96 L ed 2d 441, 83 S.Ct. 407 (1963) 20

CONSTITUTIONAL PROVISION:

United States Constitution
Fifth Amendment 3, 8, 21, 22, 23

Page

STATUTE:

California Penal Code
Section 211a 3
Section 1111 17

MISCELLANEOUS:

Comment, Lawyers and Lineups, 77 Yale L. Rev. 390 (1967) 24

Comment, Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses, 2 UCLA L. Rev. 552 15

Frankfurter, The Case of Sacco and Vanzetti (1927) 28

Meintrauh, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand. L. Rev. 485 (1957) 23

Note, Constitutional Ramifications of the Police Lineup, 12 Vill. L. Rev. 135 (1966) 28

Wall, Eye Witness Identification in Criminal Cases 15, 16, 17, 19, 25

4 *Wigmore,* Evidence Section 1130 (3rd Ed. 1940) 15, 28

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

—vs.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeal, Fifth Appellate District, State of California (A. 120-125), was certified for non-publication. (A. 119)

Jurisdiction

The judgment of the Court of Appeal, Fifth Appellate District, State of California, was filed April 25, 1967. Hearing was denied by the Supreme Court of the State of Cali-

fornia on June 21, 1967. On June 26, 1967 the District Court of Appeal, Fifth Appellate District, State of California, filed Remittitur to Fresno County, California, Clerk. Motion to Recall the Remittitur, Vacate Judgment and Reinstate Appeal, was filed June 27, 1967 in the District Court of Appeal, Fifth Appellate District, State of California and denied on June 28, 1967. Petition was filed in the Supreme Court of the State of California on July 28, 1967 for hearing on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal. On July 31, 1967 the Supreme Court, State of California granted additional time for hearing of said petition to Recall Remittitur, Vacate Judgment and Reinstate Appeal to and including September 26, 1967. On September 22, 1967 the Supreme Court of the State of California denied hearing on petition on denial of Motion to Recall Remittitur, Vacate Judgment and Reinstate Appeal.

Petition for Writ of Certiorari and motion to proceed *in forma pauperis* was filed September 8, 1967 in this Court and granted March 25, 1968, limited to the question of whether the conduct of the police lineup resulted in a violation of the petitioner's constitutional rights.

The jurisdiction of this Court rests on Title 28 U.S.C., Section 1257 (3).

Questions Presented

1) Whether the conduct of the police lineups resulted in such unfairness to petitioner, Walter Foster, that his rights to due process of law were infringed.

2) Whether specific actions of the prosecution in forcing petitioner to confront and converse with the victim of a

robbery in a private place in the presence of the police and District Attorney's Office and without counsel violated petitioner's rights under the Fifth Amendment to the United States Constitution.

Statement of the Case

Petitioner, Walter Foster, along with John Henry Grice, was charged in an information filed on the 17th day of March, 1966, by the District Attorney, in and for the County of Fresno, State of California, with violation of Section 211a, of the Penal Code, State of California, Armed Robbery. It was alleged Foster and Grice, on January 25, 1966, while armed with a gun, robbed Joseph E. David. (A. 5) Foster was also charged with two prior felony convictions. (A. 5)

On the 21st day of March, 1966 Foster appeared in Court and counsel was appointed to represent him. Arraignment was held and a plea of not guilty was entered by Foster. He admitted the prior convictions. Jury trial was set for May 9, 1966. (A. 6)

Trial was held on the 9th and 10th days of May, 1966 (A. 7-12), and on May 10, 1966 the jury returned its verdict of guilty of robbery in the first degree as to Foster; co-defendant Grice was found not guilty. (A. 11)

Report of the probation officer, judgment and sentence were scheduled for May 27, 1966. On May 24, 1966, Foster appeared in Court with counsel; the probation report having been received and considered by the Court, probation was denied and Foster was sentenced to State Prison for the term prescribed by law. (A. 16-18)

A timely notice of appeal was filed (A. 19), the record was subsequently filed in the Court of Appeal, Fifth Appellate District, State of California, and counsel on appeal was appointed. (A. 1)

The principal point raised on appeal concerned events surrounding two lineups conducted by the police at a time prior to Foster's arraignment and appointment of counsel, but after his arrest. The judgment of conviction was affirmed by the Court of Appeal, Fifth Appellate District, State of California on April 25, 1967. Subsequent appellate procedures were followed and exhausted by Foster in the California courts without relief being granted. (A. 1)

Factual Background

On January 24, 1966, John B. Clay got off work at 4:00 P.M. and traveled to the section of West Fresno, California referred to as Chinatown. (A. 45 and 46) Clay met Walter Foster there and they discussed girls and drank some wine purchased by Clay, and after some time the two men went to the rooming house where Foster and John Henry Grice lived. (A. 46 and 58) They continued to drink wine until approximately 11:30 P.M., when John Henry Grice arrived at Foster's room. (A. 47 and 58) Clay was then asked to drive Grice and Foster downtown and was advised that he would be paid $50.00 for his efforts. (A. 59 and 68)

When Clay and Foster met earlier that day Foster was wearing a black leather jacket, dark trousers and a shirt. (A. 59) Clay testified at trial Foster changed his clothes prior to going downtown, putting on coveralls, zipped all the way up and a hat. (A. 48 and 59) Whether Foster took off his leather jacket could not be recalled by Clay. (A. 59)

The trio drove to the Western Union Office in downtown Fresno where Foster and Clay, each armed, entered the office. (A. 49) Upon entering, Clay wrote a note and handed it to Joseph David, the late night manager of Western Union and the only person on duty at that time. The note stated, among other things, "This is a holdup." (A. 26) The time was 11:41 P.M. (A. 26)

Mr. David was ordered to the safe and withdrew the money box containing cash and coin. Foster took only the cash amounting to a sum in excess of $500.00 and left the building. (A. 27, 32, 52) Clay then made a threatening gesture and attempted to strike Mr. David, whereupon he also left the building. (A. 30, 36 and 62)

David testified Foster wore a turned down hat and a frock or coveralls at the time of the robbery, stating the coveralls were opened and a black leather jacket was seen underneath. (A. 30) He stated Clay wore casual clothes —a hat and suit coat. (A. 35) Clay testified that he wore a green sweater, light hat and blue jeans on that night. (A. 56)

The men were in the Western Union Office for a total of from nine (9) to eleven (11) minutes (A. 34), with Clay remaining three (3) to four (4) minutes longer than Foster. (A. 30) Mr. David did not give close attention to the men for approximately three (3) minutes while he cut a tape. (A. 26) Thereafter, and while they held guns on him he testified he got a close look at the men in the well lit room. (A. 27) However, at trial Mr. David changed his description of Foster somewhat, because, as he explained, the background when looking out of the Western Union Office on the night of the robbery was dark. (A. 42)

The three (3) men returned to Foster and Grice's rooming house where Clay left them off and thereupon returned to his home. (A. 53) The next day Clay met Foster at the Hollands Country Club and asked him for the $50.00 that had been promised; Foster refused. (A. 54) Later that evening Clay was arrested and implicated Foster and Grice in the robbery of the Western Union Office. (A. 72)

Mr. David was called to the police station two (2) or three (3) days after the robbery to view a lineup. (A. 33 and 39) There were three (3) men present in the lineup. (A. 40) One, identified later as Walter Foster, was close to six feet (6′) in height, hatless, and wearing a leather coat, similar to the one seen by David under the coveralls of one of the men who robbed him. (A. 40) The other two men were described as short men, five feet, five inches (5′ 5″) to five feet, six inches (5′ 6″) in height, both wearing hats and one with a mustache. Mr. David refused to make a positive statement in regard to identifying any of the persons who robbed him. (A. 33 and 40)

After viewing the lineup and refusing to make an identification, David asked to speak to Foster. (A. 39, 41 and 42) Mr. Kiehl of the Fresno Police Department and a gentleman from the District Attorney's Office brought Foster to an office where witness David sat across from Foster and conversed with him in the presence of the two men representing the prosecution. (A. 39, 41 and 42) David still would not identify Foster as one of the men who robbed him. (A. 40)

A week or ten (10) days later David was called to view a second lineup. (A. 33) Five (5) men, all dressed in jail dungarees, were in the lineup including Walter Foster.

Foster was the only individual present in the second lineup viewed by David who was present in the first lineup. (A. 41) David identified Foster at that time as one of the men who robbed him. (A. 34)

Summary of Argument

Petitioner, Walter Foster, was compelled to participate in two (2) lineups for the purpose of facilitating his identification by the victim of a robbery which occurred in Fresno, California on January 24, 1967. The first lineup was composed of three (3) men, including Foster. There was a disparity in size and dress between the other two (2) men and Foster. Further, Foster was wearing a jacket described by the victim as being similar to one worn by one of the men who robbed him.

At the conclusion of the lineup and upon refusal of the victim to make identification, Foster was compelled to speak and converse with the victim in a private place in the sole presence of representatives of the prosecution and without counsel.

Ten (10) days to two (2) weeks later a second lineup was held composed of five (5) men, including Foster. Walter Foster was the only man present in the second lineup who was in the first lineup. Only at this time did the victim of a robbery identify Foster as one of the men who robbed him.

The actions of members of the prosecution in the composition, events and circumstances of the two lineups were unfair and prejudicial to the rights of petitioner to due process of law.

The compelled personal confrontation between the victim of the robbery and Foster, where Foster was required to speak and converse with said victim violated Foster's privilege against self-incrimination as described in the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

The Conduct of, and Procedures Followed, by the Police and Prosecution in Two (2) Lineups and in a Personal Confrontation With the Victim of a Robbery and Petitioner, Were Highly Suggestive and Conducive to Mistaken Identification and Violated the Rights of Petitioner, Walter Foster, to Due Process of Law.

> " • • • the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."
>
> *United States* vs. *Wade,* 388 U.S. 218 at 228, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967).

Based on this premise the Court in the two (2) "lineup" decisions of *Wade* and *Gilbert* vs. *California,* 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967) set forth exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. Petitioner, Walter Foster, acknowledges the

non-retroactive effect of these decisions but makes claim that the evils recognized, stated, and condemned by the Court in *Wade* and *Gilbert* concerning police practices and procedure in the conduct of lineups were repugnantly present and manifest during the critical stages of the prosecution against him for a crime of which he was convicted and now serves time in prison.

During the robbery of the Western Union Office in the early morning hours of January 24, 1967, Joseph E. David was the lone employee on duty and the only apparent witness to the crime. He reported to the police and undoubtedly gave descriptions of the two (2) men he faced. Both were Negro, and the taller of the men, later stated to be Foster, wore a "frock" or "coveralls" with a black leather jacket in view underneath. (A. 24, 27 and 30)

The total time the men were in the Western Union Office was short and David observed the man alleged to be Foster from three (3) to six (6) minutes. (A. 26, 30 and 34) The man uttered four (4) statements for a total of approximately eighteen (18) words to David. (A. 26, 27 and 28)

On the evening of January 25, 1967, John B. Clay was arrested and, after questioning, implicated Foster and another individual in the crime. (A. 72) Foster was arrested and two (2) or three (3) days after the robbery David was asked to view a lineup. There were three (3) men in the lineup, two (2) considerably shorter than the third. (A. 33 and 40) The tall man wore a black leather jacket similar to the one seen by David under the frock or coveralls worn by one of the men who robbed him. (A. 40 and 42) Hats were worn by the short men, none by the tall man. One of the short men had a mustache. (A. 40)

The results of the lineup and the events that immediately followed the lineup were testified to by David on cross-examination at time of Foster's trial as follows:

"Q. Now about this lineup that you testified that you were at; the first lineup you could not identify Mr. Foster, is that correct?

A. I refused to—to make a positive statement.

Q. All right. Did you see Mr. Foster immediately after that lineup?

A. I asked if I could see—speak to him.

Q. And they brought him to the office—

A. And—

Q. —and who was in the office?

A. Mr. Kiehl and a gentleman from the District Attorney's Office, I forget his name, a younger man.

Q. And you had some conversation with Mr. Foster at that time, is that correct?

A. Yes. We sat across from each other.

Q. And you still did not identify him at that time, is that correct?

A. Yes—I didn't say.

Q. You were not sure at that time?

A. Pardon me?

Q. You were not sure at that time?

A. I—truthfully—I was not sure." (A. 39 and 40)

Because he did not make a positive identification of Foster, a week or ten (10) days later David was asked to view a second lineup at the Fresno County Jail. There were five (5) men in the second lineup all wearing jail dungarees. (A. 41) Foster was the only man present in the second lineup who was in the first lineup. (A. 41)

Testimony was elicited at trial by the prosecution from witness David concerning the identification of Foster at the lineups. (A. 33) The fact the jury considered the lineups is clear. (A. 115 and 116)

We contend the procedures used by the prosecution were so unnecessarily suggestive and conducive to irreparable mistake in identification that they violated Foster's right to due process of law. Further, the unfair and prejudicial lineups tainted the in-court identification of Foster and all such evidence was inadmissible. *Stovall* vs. *Denno*, 388 U.S. 293, 18 L ed 2d 1199, 87 S.Ct. 1967 (1967).

The *Stovall* case clearly indicated that despite the non-retroactive effect of *Wade* and *Gilbert*, in recognizing the right to counsel during the lineup, circumstances and events surrounding an identification procedure can be so unduly prejudicial as to fatally taint a conviction.

> *Simmons* vs. *U. S.*, — U.S. —, 19 L ed 2d 1247 (1968).

The facts and events of the lineups must be reviewed, for it was stated, "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Stovall* vs. *Denno*, 388 U.S. at 302. This is a recognition that matters can go too far. What is accepted procedure and practice by police and prosecution in the handling of accused persons can be abused to the extent convictions based on evidence obtained by extreme measures are not acceptable. The court's concern and the Due Process Clause are explained by Justice Frankfurter in *Rochin* vs. *People of California*, 342 U.S. 165, at 169, 96 L ed 183, 72 S.Ct. 205 (1952):

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'in-

escapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski vs. People of State of New York, supra, 324 U.S. at pages 416-417, 65 S.Ct. at page 789. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder vs. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, or are 'implicit in the concept of ordered liberty'. Palko vs. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288."

Palmer vs. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966) applied this rationale to an identification procedure whereby the police, through suggestive and unfair measures, so prejudiced the entire atmosphere surrounding an identification that it was held a violation of due process.

In *Palmer* the victim of a rape described her assailant as a Negro with a high pitched voice and approximately her height. She further stated he wore an orange colored sport shirt at the time of the attack and that his head was covered with a clothespin bag. The identification process involved the victim listening to the voice of a lone suspect. She was not allowed to see the suspect she was asked to identify, although she had been told by the police that a suspect was

in custody; that he was Negro; and, she had been shown an orange colored shirt taken from the suspect. The victim was not asked to listen to any other voices other than that of the suspect.

An identification was made and the subsequent conviction of Palmer was based on said identification. The district court reversed, and noted,

> "In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such a procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land. A state may not rely in a criminal prosecution upon evidence secured by pumping a man's stomach, by breaking into his home, or by employing subtle psychological methods on him; nor may it rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction."
>
> *Palmer* vs. *Peyton*, 359 F.2d 199 at 202 (C.A. 4th Cir. 1966).

The court in *Palmer* laid emphasis on certain actions by the police which when considered alone may be insignificant but when viewed from the totality of the circumstances took from the victim any alternative but to "identify" Palmer as the rapist:

1) The victim was told a Negro suspect was in custody;

2) The suspect's shirt, orange in color, and similar to a shirt worn by her assailant, had been shown to the victim before she was asked to make an identification;

3) The victim was asked to cooperate in a voice identification procedure entirely different than a normal lineup which she previously had viewed;

4) The victim was allowed to hear only one voice for identification. *Stovall* vs. *Denno,* 388 U.S. at 302 acknowledges the dangers inherent in single-suspect confrontations for the purpose of identification, noting the practice has been widely condemned. (See also, *People* vs. *Ballott,* 20 N.Y. 2d 600, 233 NE 2d 103 (1967).) Similar considerations were present in *Biggers* vs. *Tennessee,* — U.S. —, 19 L ed 2d 1267 where Mr. Justice Douglas stated in dissent at page 1269,

> "Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. (Court's emphasis.) That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections."

Single-suspect confrontations are not the sole source of examples of police practices to be condemned. Any procedure which isolates one individual from a group and suggests to the witness that the police suspect *this man* results in undue influence and is unfair to the accused. This court in *Wade* cited examples of potentially prejudicial practices among which the following were noted: "• • • that the other participants in a lineup were grossly dissimilar in appearance to the suspect, • • •"; "• • • that only the suspect was required to wear distinctive clothing

which the culprit allegedly wore * * * *" *United States* vs. *Wade,* 388 U.S. at 233.

The California Supreme Court in following *Stovall* vs. *Denno,* recently reversed a conviction because of the grossly unfair makeup of a lineup. *People* vs. *Caruso,* 68 A.C. 181 (1968). The court observed,

> "In reaching this determination, we do no more than recognize, as did the United States Supreme Court, that unfairly constituted lineups have in the past too often brought about the conviction of the innocent."
>
> *People* vs. *Caruso,* 68 A.C. at 186 (1968).

The dangers of identification events have long been recognized and written about by persons involved in and concerned with the problems of the reliability of eye witnesses' testimony and police procedure. The consistent objection and danger is "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses," which eliminates the reliability and trustworthiness of the identification. *United States* vs. *Wade,* 388 U.S. at 228. (See, *Wall,* Eye Witness Identification in Criminal Cases; 4 *Wigmore,* Evidence section 1130 (3rd Ed. 1940) and *Comment,* Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses, 2 UCLA L. Rev. 552.)

Applying this criteria to the events surrounding the arrest of Walter Foster and the subsequently held lineups it is patently obvious witness, Joseph David, was convinced and induced to make his identification of Foster by the action of the police and prosecution authorities. The first lineup in its makeup was violative of the principles an-

nounced in *People* vs. *Caruso*, 68 A.C. 181 (1968) and similar to those practices condemned by *Wade*. There was disparity in size of the participants with Walter Foster the lone tall individual. He was without a hat while the other men wore hats. One individual had a mustache when there was no indication at any time that David identified his robbers as having a mustache. Foster was isolated and set apart by the process of standing him with others of dissimilar size and dress. He was marked for identification.

Crucially and analogous to the "orange shirt" in *Palmer* vs. *Peyton, supra,* Foster was wearing a black leather jacket in the first lineup similar to one observed by David as being worn by one of the men who robbed him. The record does not disclose that David ever gave a description of the men who robbed him to the police but experience dictates this is one of the primary requisites of the initial investigation. In any event, the black leather jacket weighed heavily on the mind of David and ultimately in the mind of the jury who convicted Foster. (A. 115 and 116) (See, *Wall,* Eye Witness Identification in Criminal Cases, page 55.)

With all the above, nothing remained to be done by David except make the obviously suggested identification of Foster. He refused, however, and requested to speak to Foster.

Fairness, restraint to avoid prejudice and proper procedure would demand the request be denied and further investigatory steps be taken. However, with that "understandable zeal" which characterizes police practices that oftentimes result in abuses and unfairness to an accused, the police allowed the confrontation with the witness. We state "understandable zeal" because from the point of view

of the authorities they were undoubtedly convinced they had their man. An alleged accomplice, J. B. Clay, had identified and implicated Foster. Foster was a two-time loser, one of said convictions as a result of an armed robbery of a Western Union Office in Visalia, California, five (5) years earlier. (A. 78 and 79) A conviction was apparently assured to the prosecution if David would merely "recognize" and identify Foster. It was also essential and critical to the police and the authorities that the identification be made because of California Penal Code, Section 1111 which requires an accomplice's testimony must be corroborated before admissible. J. B. Clay, the accomplice, was their only other witness. (A. 45-70) It is obvious at this point the prosecution's chief pre-occupation was with the problem of getting sufficient proof. *United States* vs. *Wade,* 388 U.S. at 235, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967).

Foster was taken to a private room and David was allowed to speak and converse with him solely in the presence of the prosecution. This was in all respects a showup and manifested with the evils and dangers of the single-suspect confrontation. (*Wall,* Eye Witness Identification in Criminal Cases, pages 28 to 40.) A similar situation arose in *Crume* vs. *Beto,* 383 F.2d 36 (C.A. 5th Cir. 1967). The court there clearly indicated that if the police had initiated procedures which isolated the suspect and forced him to confront the witness a denial of due process would have existed. The distinguishing factor in *Crume* from this case and the point most heavily emphasized in *Crume,* was that the witness had "already settled firmly on Crume" as the accused. (*Crume* vs. *Beto,* at page 40.)

The Court pointed out,

"Once a faint glimmer of recognition strikes a witness, his tendency may be to do everything in his power to reinforce that recognition and come to a positive identification. To compensate, a fair practice might be to require the police to take every reasonable precaution to insure that the witness is not overly influenced by his original impression, and that he arrives at an objective and accurate identification. Thus even when the witness requests that the person he has tentatively identified be required to do or say something, all participants in the lineup should be required to act or speak. There is much to say for this practice. We think it is unquestionably fairer than singling out the tentative suspect. When the witness' original identification is tentative or is for some other reason suspect, such a procedure could easily rise to the dignity of a due process requirement."

Still David would not identify Foster. The final blow by the prosecution, however, was administered a week or ten (10) days later when David observed a second lineup. Foster appeared again with four (4) persons, *none of whom were in the first lineup.* What more could the prosecution do which would suggest to David their interest in having Foster identified? Their actions in effect told David that here is the man. One commentator views the procedure of a second lineup as follows:

"If the witness views a line-up and fails to make an identification, should he be permitted to view it a second time? Generally, he should not, unless the circumstances of the line-up are to be changed; for ex-

ample, unless glasses or hats are to be worn by the participants during the witness's second view. If the witness is asked to view the same line-up a second time, without such a justification, an impression may be created that the police are improperly attempting to secure an identification from a person unable to make one—an impression which may reflect upon their credibility should they happen to testify as to any other material fact in the case. Moreover, the witness himself, if asked to view the same line-up a second time, may infer that the police are confident that their suspect is the guilty party, and he may thus be influenced to make an identification which he would not otherwise make. And, of course, if the witness is asked to view a second and different line-up containing the same suspect he failed to pick out the first one, there is a great danger that he will 'recognize' the suspect, realize that he has seen him before and, acting upon this recognition, identify him."

Wall, supra, at 64.

Every step taken by the prosecution during the identification process was calculated to bring about one result—for Joseph David to identify Walter Foster. No one procedure escapes criticism; persuasion, unfairness, prejudice and suggestion ran rampant over the rights of petitioner. The authorities convinced Joseph E. David that Walter Foster robbed him.

The grossly unfair composition of the first lineup was inexcusable. The witness had but little opportunity to observe the men who robbed him. (A. 26, 30 and 34) He faced them while nervous and fearful of his life, and while observ-

ing guns pointed at him (A. 28), in a place he contradictorily described as "well-lit" (A. 27), however, subject to a "contributory factor" of a background of total darkness. (A. 42) He was unsure and subject to suggestion. There was no urgency or need for immediate action as in *Stovall* which required the single-suspect confrontation with the witness. And, finally, the second lineup from which the witness could only draw one conclusion: that this man he had seen in the previous lineup and with whom he was allowed to speak and converse must be the right man.

The suggestion and influence by the authorities in the identification process before trial tainted the in-court identification of petitioner and resulted in such unfairness that it infringed petitioner's right to due process of law. *Wong Sun* vs. *United States*, 371 U.S. 471, 96 L ed 2d 441, 83 S.Ct. 407 (1963); *Gilbert* vs. *California*, 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967). The conviction of Walter Foster should be reversed and remanded for a new trial unaffected by Joseph E. David's tainted identification.

II.

The Compelled Confrontation of Petitioner and a Prosecution Witness in a Private Place, and in the Sole Presence of the Prosecution Authorities, Where Petitioner Was Required to Speak and Converse With the Witness Violated Petitioner's Privilege Against Self-Incrimination.

Mindful of the majority decision in *United States* vs. *Wade*, 388 U.S. 218, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967) petitioner, nevertheless, raises the issue of violation of his rights under the Fifth Amendment to the United States Constitution in regard to the compelled confrontation with the principal witness for the prosecution where petitioner was required to speak and converse with said witness in the presence of the police department and the prosecution and without counsel, all to facilitate his identification. The compulsion and requirement by the authorities for Foster to converse and speak to the witness violated his privilege against self-incrimination.

At the first lineup Foster was required to attend, the prosecution witness could not make identification of the man who robbed him despite the many suggestive factors attendant in the composition of the lineup. (A. 39, 40) The witness asked to speak to Foster and Foster was compelled to comply. It is clear he was forced at this point to assist the prosecution in convicting him by speaking and conversing with the witness, David.

The Court in *Miranda* vs. *Arizona*, 384 U.S. 436, at 460, 16 L ed 2d 694, 86 S.Ct. 1602 (1967) set forth the policy of the privilege against self-incrimination as follows:

"We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. (Citations) All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. (Citation) In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' Malloy vs. Hogan, 378 U.S. 1, 8, 12 L ed 2d 653, 659, 84 S.Ct. 1489 (1964)."

The right to remain silent should mean just that, and not to remain silent, except at a lineup or when you are asked to assist the prosecution in prompting a doubtful witness to make identification. Justice Black in dissent in *United States* vs. *Wade,* 388 U.S. at 245, indicated the requirement to speak in a lineup is a violation of the Fifth Amendment which requires a reversal and prohibition of the lineup identification at a subsequent trial. He stated:

"So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear

strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by the Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself."

We contend any violational act which can directly connect an accused with a crime should be within the protection of the Fifth Amendment. Requiring an accused to speak and converse with a witness to aid and facilitate identification is such a violational act. This is a far cry and can be distinguished from merely exhibiting your person along with others for comparison in a properly constituted, objective lineup. (*Meintrauh,* Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand. L. Rev. 485 (1957).)

We have raised this issue with the factual circumstances of the lineup procedures experienced by Foster primarily in mind. Also, in conjunction therewith, the protective measures and doctrine of the *Wade* and *Gilbert* cases are questioned. In short, we ask if an attorney had been present with Walter Foster at the time of the lineups and during the surrounding events thereto, would Foster be adequately protected in his constitutional rights as envisioned by the Court in these decisions? Can the mere presence of an attorney meet the danger, " • • • where so many variables

and pitfalls exist * * * ", and where, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eye witness identification at the lineup itself." *United States* vs. *Wade,* at 235.

We contend the answers supplied by *Wade* and *Gilbert* are inadequate; that these decisions constitute a recognition of the problem and some protection for an accused, but that a lineup or showup is such a potential source of unfairness and prejudice that greater safeguards of the rights of individuals is demanded.

Guidelines and standards must be set forth which will direct the authorities, courts and counsel in protecting the rights of the accused at a time so critical. (See *Comment,* Lawyers and Lineups, 77 Yale L. Rev. 390 (1967).) To recognize voice identification as within the privilege against self-incrimination the court will protect "one of our nation's most cherished principles—that the individual may not be compelled to incriminate himself" (*Miranda* vs. *Arizona,* 384 U.S. at 458), and provide the authority to correct some abuses of the lineup procedures.

Experience dictates that the court is correct in stating:

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at a pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man'."
>
> *United States* vs. *Wade,* 388 U.S. at 235, 236.

However, we disagree that "a meaningful confrontation at trial" is a sufficient safeguard and we ask how does "presence of counsel itself * * * often avert prejudice?"

United States vs. *Wade*, 388 U.S. at 236.

The problem of relying on cross-examination of witnesses and the defense establishing the parade of evils of an unfair lineup are noted in a recent California appellate decision:

> "But here it was not the prosecution which brought the condemned method of obtaining the identification into evidence: it was defendant herself. The prosecution is to be commended that it shunned taking advantage of the officers' improperly obtained evidence. We cannot say, however, that that completely cured the evil. The jury was concerned with the ultimate verity of identification. The circumstances here put defense counsel on the horns of a dilemma. Either he allowed the courtroom identification to go unchallenged or he himself was driven to put the inadmissible evidence before the jury to demonstrate its spurious nature.
>
> A defendant should not be thus tactically disadvantaged."

People vs. *Pedercine*, 256 A.C.A. 357 at 366 (1968).

Also, the defense is faced with placing great emphasis on the pre-trial lineups which will only strengthen the case in the minds of the jurors who tend to believe the prosecution witnesses, and oftentimes solidify the testimony of the witness. (*Wall*, Eye Witness Identification in Criminal Cases, at 19.)

To be able to prevent an unfair and prejudicial lineup, direction to your client is necessary, backed by knowledge of the authority of your position.

Discussion of the privilege against self-incrimination in the majority opinion of *Wade* relied on this Court's recent decision in *Schmerber* vs. *California,* 384 U.S. 757, 16 L ed 2d 908, 86 S.Ct. 1826, wherein the court said at 763, 764:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd vs. United States, 106 U.S. 616, 29 L ed 746, 6 S.Ct. 524. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

As acknowledged by the court "this distinction is a helpful framework for analysis" (*Schmerber* vs. *California,* 384 U.S. at 764. However, it should not be compelling in every instance. Countervailing considerations should be weighed in the light of the value of the evidence that is sought. *Miranda* vs. *Arizona,* 384 U.S. at 461.

Throughout the decisions in *Wade, Schmerber* and *Miranda* the court was involved in weighing values, not the least of which is the reliability of the evidence ultimately obtained. Compare:

> "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."
>
> *Schmerber* vs. *California,* 384 U.S. 757, at 771, 16 L ed 2d 908, 86 S.Ct. 1826 (1967), with:
>
> "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."
>
> *United States* vs. *Wade,* 388 U.S. at 228.
>
> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."
>
> *Miranda* vs. *Arizona,* 384 U.S. at 458.

Lineups are most commonly used following crimes where the victims face the criminal for short periods of time under great stress and fear. Robberies and rapes predominate. *United States* vs. *Wade,* 388 U.S. at 230. The robber or rapist oftentimes has his face covered (*United States* vs. *D'Argento,* 373 Fed. 2d 307 (C.A. 7th Cir. 1967); *State* vs. *Ramirez,* 76 N.M. 72, 412 P.2d 246 (1966)) or speaks in a whisper. (*People* vs. *Ellis,* 65 Cal.2d 529 (1966).) To say that voice identification presents reliable evidence under the circumstances of the great majority of these type criminal cases is stretching a point beyond practicality. It is difficult to deny that the Supreme Court of California was correct when it stated in the recent case of *People* vs. *Ellis,* 65 Cal.2d 529 (1966), at 534:

> "The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints."

However, to say even the most discerning witness to a robbery or a victim of a rape can make these distinctions following five (5) to ten (10) minutes of violence where a person speaks through a clothespin bag (*Palmer* vs. *Peyton,* 359 F.2d 199 (C.A. 4th Cir. 1966)) or a stocking or t-shirt mask (*State* vs. *Ramirez, supra; United States* vs. *D'Argento, supra*) or after listening to eighteen (18) spoken words by a nervous robber (A. 26, 27 and 28), is contrary to common sense. An objective voice identification could not be made under these circumstances. (See, Note, Constitutional Ramifications of the Police Lineup, 12 Vill. L. Rev. 135 (1966).)

As stated in *Wade,* 388 U.S. at 229,

> " • • • the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."

The value and reliability of the so-called identification of voice is further diminished when used, as is often the case, in the single-suspect confrontation. (*Palmer* vs. *Peyton, supra; Stovall* vs. *Denno,* 388 U.S. 293, 18 L ed 2d 119, 87 S.Ct. 1967 (1967) and *State* vs. *Ramirez, supra.*) No objective means of comparison are given and the power of suggestion is strong. 4 *Wigmore,* Evidence Section 1130 (3rd Ed. 1940); *Frankfurter,* The Case of Sacco and Vanzetti, 32 (1927).

The value of the voice identification is minimal when weighed with the dangers implicit in the lineup procedure and the need for counsel to have the necessary means by which to safeguard the accused's constitutional rights. The right to remain silent at a lineup; to refuse to speak for voice identification should be protected by the privilege against self-incrimination. Petitioner Walter Foster's privilege against self-incrimination was violated by the prosecution's requirement that he speak and converse with Joseph E. David.

The admission into evidence of testimony concerning the illegal lineup requires the conviction of Foster be vacated and remanded for a new trial excluding the identification testimony of Joseph E. David. *Gilbert* vs. *California,* 388 U.S. at 273.

Conclusion

For the reasons hereinabove stated, the judgment of conviction of petitioner, Walter Foster, in the District Court of Appeal, Fifth Appellate District, California should be vacated, and the case remanded for further proceedings and a new trial excluding the identification testimony of prosecution witness, Joseph E. David.

Respectfully submitted,

KENNETH L. MADDY
Attorney for Petitioner,
Walter Foster